Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1977

No. **77-650**

LOUISE SPENCER,

Petitioner,

vs.

FLOYD SKELTON, IDAHO LIVESTOCK COMMISSION COMPANY, AND THE IDAHO FIRST NATIONAL BANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of the State of Idaho entered in this proceeding as a final judgment on July 20, 1977.

OPINION BELOW

The June 27, 1977, Opinion of the Supreme Court of the State of Idaho, made final July 20, 1977, appears in separate appendix hereto at pages App. 1 to App. 10. This Opinion affirmed the Judgment of the District Court of the Seventh Judicial District of the State of Idaho, in and for Bonneville County, Idaho, dated January 21, 1976.

—o—

JURISDICTION

The Final Judgment of the Supreme Court of the State of Idaho was entered July 20, 1977, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 USC § 1257(3).

—o—

QUESTIONS PRESENTED

1. Have the Petitioner's rights to due process under the 14th Amendment been violated by the handling of the trial in this matter?

2. Have the Petitioner's rights to due process as provided by the 14th Amendment been violated by her deprivation of property without due process under color of Idaho law?

3. Have the Petitioner's 14th Amendment rights to equal protection of the law been violated through the acts of the Idaho Court in the application of Idaho law?

4. Have the Petitioner's right to jury trial been violated by the refusal of the Trial Court in this matter to grant jury trial?

5. Have the Petitioner's right to counsel as guaranteed by the 6th and 14th Amendments to the United States Constitution been violated by the process employed by the Idaho Courts in this litigation?

6. Have contract rights of the Petitioner been abrogated by the acts of the Idaho Courts in this matter?

—o—

CONSTITUTIONAL PROVISIONS

The following constitutional provisions are involved in the resolution of this matter:

(1) Article 1, § 10 of the United States Constitution; (2) the 6th Amendment to the United States Constitution; (3) the 7th Amendment to the United States Constitution; (4) the 14th Amendment to the United States Constitution.

—o—

STATEMENT OF THE CASE

I. The Background.

In 1960, Stanley R. Spencer, the husband of the Petitioner, died testate in the State of Idaho. At the time of his death, Spencer was a principal in a very successful livestock commission business. He was a partner in the

"Auction Company," the actual operating entity of the livestock auction business, a shareholder in the "Commission Company," the company which held the real property and physical features used in the operation of the auction company, and a partner in the "Trading Company," a separate entity which purchased cattle for gain and resale.

According to Idaho law, the estate was the community property of Stanley R. Spencer and the Petitioner, unless through inter vivos gifts, the decedent's half of the community estate had been dissipated. In any event, at least half of the estate remaining at the date of death of Stanley R. Spencer was the property of the Petitioner.

According to the will of Stanley R. Spencer, the Respondent, Idaho First National Bank, was named executor and trustee, and the bulk of the estate, according to the will, became part of the corpus of a trust for the benefit of the decedent's children.

Upon the death of Stanley R. Spencer, the Respondent, Idaho First National Bank, took possession of the entire estate including the Petitioner's interest in the community estate. This was done under color of Idaho law.

On March 31, 1961, in the course of the probate, the Respondent, Idaho First National Bank, acting through the same counsel which represented the decedent, the executor and the buyer, purportedly "sold" to the Respondent Skelton, the interest of the decedent and of the Petitioner in the "Auction Company". The sale was in fact a gift because the "consideration" given was money due the decedent. This "sale" was accomplished without the

consent of the Petitioner purportedly under color of court process of the Idaho courts and purportedly under color of Idaho law. This "sale", first discovered by the Petitioner some eleven days after the "sale", was attacked by the Petitioner on the basis of a lack of authority to deal with her interest in the property and upon the basis of fraud. After unsuccessful attempts to set aside the sale in the Probate and District Courts of Bonneville County, Idaho, the Petitioner appealed the question to the Idaho Supreme Court and in *Spencer v. Spencer,* 91 Idaho 880, 434 P. 2d 98 (1967) the Idaho Supreme Court reversed the lower court orders which had refused to consider the Petitioner's request for relief, and remanded, with instructions to proceed to trial on the questions posed by the Petitioner's complaint.

Against this background, this matter was set for trial in the District Court for Bonneville County, Idaho, on May 1, 1973.

II. The Primary Case Disposition.

After a number of procedural events, the Complaint of the Petitioner attacking the 1961 sale of her interest and of the estate's interest in the "Auction Company" came to issue and was set for jury trial on May 1, 1973. As of the first day of trial, materials critical to the trial had not been made available to the Petitioner despite the remand order of the Idaho Supreme Court ruling that these materials were to be made available. These significant materials included the decedent's books which had been kept under the exclusive control of the Respondent, Idaho First National Bank, without direct access thereto by the Petitioner, despite her apparent right to access to

those books, again purportedly under color of Idaho law, through the claim of the Respondent, Idaho First National Bank, that it had exclusive possessory and managerial rights as to all affairs of the community estate regardless of the interest of the Petitioner. Also included were the books of the "Auction Company" which had been held in the possession of the Respondent Skelton, purportedly acting under color of Idaho law, as surviving partner of the "Auction Company" partnership. While some limited access had been permitted to the decedent's books for the benefit of the Petitioner's accountants (without any personal access thereto by the Petitioner) no access had been permitted to the books of the "Auction Company," although access to these books was, of course, critical to the development of the issues in the pending case.

The presiding District Judge did require the books to be brought into court on the first day of trial, May 1, 1973. This was the first time that the Petitioner, her counsel, or accountants had been given access to these books, a highly critical part of the evidence necessary to the trial. At the time that the books were made available the trial had actually commenced and the jury was in the process of empanelment.

On May 2, 1973, the Petitioner was contacted by her then counsel and advised that settlement negotiations would be held, directed toward the settlement of the litigation specified. At that time the Petitioner was impecunious in that the Respondent, Idaho First National Bank, after twelve years, retained control over the community estate, purportedly under color of Idaho law,

doling out to the Petitioner only a very modest family allowance which was insufficient even for her basic needs, without any funds for the payment of attorneys' fees or other extraordinary costs.

At this posture of the case, the Petitioner was still without real access to the highly critical books both of the decedent and of the "Auction Company." She was without help from the entity which controlled her funds and records, purportedly under color of Idaho law, the Idaho First National Bank, which was in truth in an antagonistic position toward her in the litigation, having acquiesced in the "sale" which she claimed to be vitiated by fraud and by lack of consideration. She was under the misimpression, given her by counsel, that she could not disagree with her counsel's disposition of the case and the negotiations directed toward the settlement of the case, without discharging him. She was under the misimpression, given by counsel, that she could not discharge counsel without payment of his accrued fees, funds for the payment of which fees she lacked because of the control of her estate by the Respondent, Idaho First National Bank. She was under the misunderstanding that the case would be lost (the Trial Judge was holding the jury pending negotiations) if the negotiations failed through her refusal to participate therein and that the case would be dismissed on a default basis. She lacked knowledge of the law.

Against this background, a "settlement" was purportedly achieved. There were in fact no offers and no negotiations. The Petitioner was confronted with a proposed settlement agreement and was told that this was

what she must accept. The "settlement agreement" demanded that in addition to surrendering her claim in connection with the 1961 "sale" she would be required to transfer her interest in the stock of the "Commission Company" and her interest in the "Trading Company" to the Respondent Skelton. Moreover, she was required, in violation of contracts dated 1963 and 1968, to obtain the signature of the children of her and of the decedent before the fruits of the "settlement" would be made available to her. The requirement of the children's signature was made under color of Idaho law to the effect that a widow is without right to the disposition of her interest in the community estate and that right is retained by the executor and by the children of the husband. Even though the thrust of the original Complaint by the Petitioner was that the "sale" was achieved without her consent, even though the property was hers or at least half hers, in the "settlement" this same basic premise was subscribed to and, under color of Idaho law, it was required that Petitioner retain that subservient role assigned to a widow under Idaho law requiring that the children of the parties be signatories to the disposition of the Petitioner's own property.

Absent actual access to the facts, absent legal knowledge, absent assistance, financial or otherwise, from the party given control over her property by Idaho law, and absent independent counsel, the Petitioner executed the "settlement" agreement, an agreement grossly disproportionate to the actual value of the claims and assets foregone and assigned by the terms of the "settlement" to the benefit of the Respondent Skelton. Upon obtaining independent counsel and some knowledge of the law, the Petitioner repudiated the "settlement agreement".

III. The Present Case.

Upon the refusal of the Petitioner to implement the "settlement agreement" of May 1973, this action was initiated by the Respondent Skelton, to compel the Petitioner to implement the "settlement agreement". For some significant period of time, the Petitioner was without counsel and had no opportunity to defend the action. She was still deprived of access to her estate by the Respondent, Idaho First National Bank, purportedly acting under color of Idaho law, which refused to distribute the estate and to give to the Petitioner her interest therein. The Petitioner was then in bad health and was unable to personally come from her home in the State of Colorado to the State of Idaho to defend the action. Appearances were made by the Petitioner without benefit of counsel in the pending action, but she was repeatedly advised that counsel was necessary and that she should obtain counsel, whomever she was able to obtain, and that she should accept a subservient role to that counsel in the litigation. Although it was apparent from the unskilled pleadings of the Petitioner that jury trial of the claims of the Respondent was demanded, the Trial Judge, purportedly acting under color of Idaho law, refused to give jury trial. He further refused to assist the Petitioner in obtaining the assistance of counsel.

Ultimately the Petitioner was able to obtain the assistance of counsel even though she remained impecunious and without funds for attorneys' fees, but that counsel, without real opportunity to develop the facts of a very complex case, was required to immediately appear and be ready for trial. Adding to the complexity of the

problem, the Probate Court files of the estate of the decedent, files of the County of Bonneville, State of Idaho, were then missing and not subject to access by counsel for the Petitioner.

Against this background, the case went to trial in the absence of a jury and in the absence of the Petitioner, who was unable, because of her financial circumstances and because of her health, to be present at the trial. She was permitted to present testimony by affidavit, but this was a poor substitute for actual appearance and deprived the Petitioner of her right to confront the witnesses and generally deprived her of due process in the course of the trial.

In trial, former counsel for the Petitioner was permitted to testify as to conversations of a confidential nature held between counsel and the Petitioner and was further permitted to give his opinion as to the "fairness" of the "settlement agreement".

The Trial Court accepted the appraisal given by former counsel, over strong objection of present counsel for the Petitioner, as to the "settlement", based upon the revelation of confidential discussions between former counsel and the Petitioner and evaluation by former counsel, without supporting data, of the "fairness" of the "settlement agreement". Favorable decision was given the Respondent Skelton and the Petitioner was required to implement the "settlement agreement", or, in the absence of this, to have the Clerk of the District Court act in her stead in the implementation thereof.

The Petitioner took this matter to the Idaho Supreme Court, upon an appeal, where the decision was affirmed,

the Idaho Supreme Court rejecting arguments of impropriety of testimony of former counsel, impropriety of compulsion in the implementation of the "settlement agreement," fraud and lack of the essential elements of contract in the "settlement agreement" and other arguments here set out.

This Petition is taken from the final judgment of the Idaho Supreme Court affirming the District Court's disposition of the action filed by the Respondent Skelton.

REASON FOR GRANTING THE WRIT

The Petitioner believes that questions of fundamental constitutional dimension are presented by this case. The Petitioner has been denied the due process of law afforded her by the 14th Amendment both in the handling of the case by the courts of the State of Idaho and by her deprivation of property without due process of law through the retention by the Respondent, Idaho First National Bank, of her property in the community estate of herself and the decedent and, through that property, the ability to properly represent herself in the course of the legal proceedings in the State of Idaho. The Petitioner has also been deprived of the equal protection of the law as afforded her by the 14th Amendment through the application of the Idaho law of probate and management of community estates. She has been denied 7th Amendment rights to jury trial; she has been denied 6th and 14th Amendment rights to the assistance of counsel; and she has seen her contract rights abrogated and violated in

violation of Article II, § 10 of the United States Constitution.

Because of these violations and because of the continuing violation of the rights of women through the Idaho Probate Code, the Petitioner believes there is a substantial federal question to be determined by the acceptance of this Petition.

I.

A Denial of Due Process

A. The handling of the litigation by the Idaho Courts.

While the United States Constitution does not prescribe any given set of procedures which must be employed by the state in the processing of litigation, federal constitutional standards, as demanded by the 14th Amendment, do require some type of fair and orderly procedure. *Jenkins v. McKeithen,* 395 U. S. 411, 428-430, 89 S. Ct. 1843, 1852-1853 (1969). Among those standards of due process in the handling of litigation are the right to notice, the right to appear personally, the right to confront witnesses, the right to effective assistance of counsel, and the right to fair judgment. As this Court has stated in *Jenkins* (at p. 428 U. S., p. 1852 S. Ct.) the right to confront witnesses is essential to due process. In this case, as we have pointed out in the Statement of the Case, the Petitioner was effectively denied assistance of counsel during several phases of the trial, she was not given the opportunity to appear personally, she was not given any real opportunity to confront witnesses against her and her counsel was obliged to attempt to defend the

case without adequate time, without adequate access to records, and without adequate assistance of his client.

The present case was in actuality only an extension of the earlier case intended to be dispositive of the Petitioner's claim to set aside a "sale" of her interest in property and of the interest of her deceased husband in that same property. In that earlier trial, the Petitioner had been denied effective preparation and effective assistance of counsel by the Trial Court's refusal to allow her access to certain highly critical materials until the beginning day of trial.

Both cases involve serious breaches of the Petitioner's right to some fair and orderly procedure in the Idaho Courts, designed to fairly determine the mutual claims of the parties.

B. The deprivation of property without due process.

Under the 14th Amendment, no person can be deprived of property without due process. Recent decisions of this Court have, if anything, made that fundamental Constitutional right more strongly established than at any other time in history. *Fuentes v. Shevin,* 407 U. S. 67, 86, 92 S. Ct. 1983, 1996 (1972); *Board of Regents of State's Colleges v. Roth,* 408 U. S. 564, 573 and 577, 92 S. Ct. 2701, 2706-2708 (1972); *North Georgia Finishing, Inc. v. Di-Them, Inc.,* 419 U. S. 601, 95 S. Ct. 719 (1975). According to this Court's reasoning in *Fuentes* (at p. 87 U. S., p. 1997 S. Ct.) any significant property interest is protected by the 14th Amendment.

Under Idaho law (prior to its amendment in 1974—ISL 1974, ch. 194, § 2, p. 1502) the husband was given

exclusive management and control of the community property, with certain minor exceptions. 32-912, I. C. the Idaho Code, 15-410, gave the executor the right to possession of all real and personal estate of the decedent. Interpreting this section and 14-113, I. C., the Idaho Supreme Court has granted the administrator the right to manage and control not only the decedent's half of the estate, but the survivor's half as well. *Swinehart v. Turner,* 44 Idaho 461, 467, 259 p. 3 (1927); *Davenport v. Simons,* 68 Idaho 21, 24, 189 P. 2d 90 (1948). The net effect of this Idaho legislation and court decision has been to deprive the Petitioner herein of her property, without process of law, for seventeen years. During all that period of time, the Respondent, Idaho First National Bank, has, under color of Idaho law as here set out, deprived the Petitioner of her right to management and control over her own property to her very serious disadvantage. Because she has not had that property, she has been unable to fund her representation in the various challenges that have been posed to the integrity of her property. Moreover, through court process, her property has been sold without her consent, she has been obliged to add disinterested parties to the fruition of any purported "settlements" and has generally been seriously deprived of her 14th Amendment rights. No modification in the Idaho case law as to the administration of estates seems to have made any change in the case law cited. The net effect of the statutes and their interpretation by the Idaho Courts is to deprive a widow of the right to her property by reason of the dictates of her deceased husband as to his desired control of the community property.

II.

Equal Protection of Law

The Idaho Probate Law has been the subject of severe criticism in its cavalier treatment of women. This Court in *Reed v. Reed,* 404 U. S. 71, 92 S. Ct. 251 (1971) struck down the provision of Idaho law which discriminated in the administration of estates as between males and females. This is the language of the Court at p. 75 (U. S.), p. 253 (S. Ct.):

> ". . . We have concluded that the arbitrary preference established in favor of males by § 15-314 of the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of laws to any person within its jurisdiction."

Clearly here a surviving spouse is denied the equal protection of the law and has, through seventeen long years, been deprived of access to her property and, by access to that property, access to effective representation in the courts. Surely it cannot be suggested that the "settlement," demanding as it does a signature of her children to a purported contract dealing with her property, all under the color of Idaho law, can be anything but the rankest denial of equal protection.

III.

The Right of Jury Trial

Whether or not one interprets the 7th Amendment's guarantee of jury trial to apply only to the Federal Courts or to the State Courts as well, surely the right to jury trial is a fundamental concept of due process

where that right to jury trial was part of the common law fabric. *Baltimore & Carolina Line v. Redman,* 295 U. S. 654, 656-657, 55 S. Ct. 890, 891 (1935). As this Court has stated the federal policy in favor of the preservation of jury trial for citizens litigant is strong. *Simler v. Conner,* 272 U. S. 221, 222, 83 S. Ct. 609, 610 (1963).

Here the Petitioner was denied her right to jury trial. Certainly her inartful attempts at pleading which may not have concisely made the jury demand, still were sufficiently clear that she was requesting a jury trial and the Trial Court refused that right to jury trial.

IV.

Right to Counsel

As has been pointed out in the Statement of the Case, the Petitioner has in many significant respects been denied the right to counsel, particularly in the final action tried before the Idaho Courts. The right to counsel has been recognized as a fundamental part of the concept of due process as protected by the 14th Amendment, whether the proceeding in question is criminal or civil in nature. *Powell v. Alabama,* 287 U. S. 45, 53 S. Ct. 55 (1932); *Chandler v. Freitag,* 348 U. S. 3, 10, 75 S. Ct. 1, 5 (1954); *Reynolds v. Cochran,* 365 U. S. 525, 530, 81 S. Ct. 723, 726 (1961); *Holt v. Virginia,* 381 U. S. 133, 136, 85 S. Ct. 1374, 1378 (1965). This is the language of this Court in *Chandler, supra*:

> "(The Court here quotes from *Powell v. Alabama,* supra) if in any case, civil or criminal, a State or Federal Court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of hearing, and therefore, of due process in the constitutional sense."

In addition to the denial of effective assistance of counsel as specified, another kind of denial of counsel was present in this case. Certainly a part of effective assistance of counsel is the belief that one may freely impart confidences to counsel, sure of the rule which prohibits the disclosure of those confidences. Moreover, counsel, privy to the innermost thoughts of his client, certainly ought not to be able subsequently to testify as to the product of those thoughts in the purported reasonableness of a "settlement". In this case, counsel was permitted to do both, to reveal confidences and to testify as to the purported reasonableness of a "settlement". The Trial Court's consent to this heinous practice effectively deprived the Petitioner of her right to effect counsel in the "settlement" and seems to the Petitioner to be clearly another deprivation of the right to effective counsel and the right to due process.

V.

Abrogation of Contract

In the process of the "settlement" here described, the Petitioner was required to abrogate contracts of 1963 and 1968 by the terms of which her children agreed to forego any claim to any part of their father's estate in favor of the Petitioner. By the "settlement", now enforced by the Idaho Courts, she is compelled, in order to achieve any fruits of that "settlement", to obtain the joinder of her children. Clearly this is an abrogation of contract in violation of the provisions of the United States Constitution.

———o———

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgments and Opinions of the Supreme Court of the State of Idaho.

Respectfully submitted,

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APPENDIX

In The Supreme Court of the State of Idaho

No. 12250

Pocatello March 1977 Term

Filed: June 27, 1977

R. H. Young, Clerk

FLOYD E. SKELTON and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho Corporation,

Plaintiffs and Respondents,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, Deceased,

Defendants,

LOUISE SPENCER and MIRIAM SPENCER,

Defendants and Appellants.

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bonneville County. The Honorable Willard C. Burton, District Judge.

Appeal from a judgment of the district court granting to plaintiffs specific performance of settlement agreements executed by plaintiffs and defendants. *Affirmed.*

Lloyd J. Webb, Webb, Burton, Carlson & Pedersen, Twin Falls, for appellants.

Terry L. Crapo, Holden, Holden, Kidwell, Hahn & Crapo, Idaho Falls, for respondents.

SCOGGIN, D. J. (ret.)

Defendants and appellants Louise Spencer and her daughter Miriam Spencer appeal from a judgment of the district court in favor of plaintiffs and respondents Floyd E. Skelton and the Idaho Livestock Commission Company on their action for specific performance. Respondents brought their action seeking specific performance of settlement agreements which they and the appellants executed to settle an action pending between them. We affirm the judgment granting specific performance.

The basic facts of the action which was allegedly settled by the agreements at issue here are stated in the opinion of this Court in *Spencer v. Spencer,* 91 Idaho 880, 434 P. 2d 98 (1967). Following the remand to the district court after the appeal to this Court, several years of postponements and delay ensued before the underlying action was set for trial. However, the action was finally set for trial on May 1, 1973, and on that day a jury was selected. Before counsel made their opening statements, respondents and appellant Louise Spencer entered into negotiations through their respective counsel to settle the action. A compromise was reached which was reduced to the written settlement agreements at issue here.

At the time the settlement agreements were executed and for some two months thereafter, appellant Louise Spencer was apparently satisfied with the agreements and with the work of her then counsel in obtaining them. Subsequently Mrs. Spencer discharged her former attorneys and refused to perform her covenants under the settlement agreements. Respondents served notice of default and brought this action for specific performance of the settlement agreements.

The minute details of the settlement agreements are not important here. Briefly, in consideration of a payment of $37,500 from respondent Skelton ($5,000 of which was paid upon execution of the agreements), appellants covenanted not to proceed further in the action brought by Mrs. Spencer and not to execute against respondent Skelton. A covenant not to sue was executed with respondent Idaho Livestock Commission Company in consideration of a payment of $150,000 ($25,000 paid upon execution) and upon the covenant of appellants to obtain good title to and convey to the Company the stock of Mrs. Spencer's deceased husband in the Company.

The focus of appellant Louise Spencer's position in this case is an attack on the enforceability of the settlement agreements. Her evidence, which consisted solely of her affidavit, was largely directed to the pressures allegedly exerted on her during the settlement negotiations. The principal source of these alleged pressures, giving her affidavit a fair reading, was purportedly her then attorneys. There are also allegations against respondent Skelton of essentially the same character as those advanced in the original action: fraud and breach of the fiduciary duty of a surviving partner. The formal lines of appellants' defense to the action for specific performance were based on the grounds of fraud, duress, coercion and lack of assent in the execution of the settlement agreements.

The case was presented to the trial court at two separate hearings. Respondents' case-in-chief was put on at the first hearing, which appellant Louise Spencer was unable to attend personally. The case was continued for a while to determine whether Mrs. Spencer would present

her testimony in person, or by deposition or affidavit. At the second hearing, Mrs. Spencer's affidavit was read into the record as her testimony and then appellants rested. Respondents presented a rebuttal case through the testimony of Mrs. Spencer's former attorneys.

In granting respondents the relief of specific performance of the settlement agreements, the trial court expressly found and concluded that appellants had assented to the execution of the settlement agreements, and that neither respondents nor appellant Louise Spencer's former attorneys had been responsible for any fraud, duress or coercion in the negotiations leading to, and the execution of, the settlement agreements. In reaching its decision, the trial court relied upon the testimony of appellant Louise Spencer's former attorneys, which was admitted over the appellants' objections that it violated the attorney-client privilege for confidential communications.

Although appellants make twenty-nine assignments of error, the repeated ground for their assignments of error is the trial court's alleged error in admitting the testimony of appellant Louise Spence's former attorneys. Analytically, the case before us thus presents two issues: (1) Did the trial court err in admitting into evidence the testimony of appellant Louise Spencer's former attorneys on the ground that she waived the privilege against disclosure of confidential communications between attorney and client by testifying to the confidential communications? (2) Is there substantial, competent evidence in the record to support the trial court's findings of fact, conclusions of law and judgment?

The client's privilege against disclosure of confidential communications between attorney and client is provided for in Idaho by statute. I. C. § 9-203 provides in pertinent part:

> "9-203. Confidential relations and communications. —There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person can not be examined as a witness in the following cases:
>
> . . . .
>
> 2. An attorney can not, without consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment."

In construing a related subsection of I. C. § 9-203, we have previously noted that:

> "[I]t must be said that so far as interpreting subdivision 2 of C. S., sec. 7937, [I. C. § 9-203 (2)] the use of the words 'without the consent' of the client made no change in the common law, and that that subdivision is a mere restatement of the common law. It is reasonable to say that the legislature intended the common-law interpretation thereof." *Sprouse v. Magee,* 46 Idaho 622, 631, 269 P. 993 (1928).

Thus, as at common law, the "consent" of client to the disclosure of confidential communications may be either express or implied from the conduct of the client. *Grant v. Harris,* 116 Va. 642, 82 S. E. 718, 719 (1914); 8 Wigmore on Evidence § 2327, at 634 (McNaughton rev. 1961). When the "consent" of the client is found, the privilege is said to have been "waived."

The waiver, if any, must be found by implication. Therefore we are faced with a slightly more difficult problem. Wigmore has succinctly stated it as follows:

"What constitutes a *waiver by implication?*

"Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i. e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final." 8 Wigmore, *supra,* § 2327 at 635-36. (Emphasis in original; footnote omitted.)

Significant consideration must also be given to whether the rationale behind the privilege—encouraging a full and frank professional relationship between attorney and client—has any continued vitality in light of the client's conduct. *See:* Comment, "Limitations on California Professional Privileges: Waiver Principles and the Policies They Promote," 9 U. C. D. L. Rev. 477 (1976).

Among others, Wigmore has identified the following as two instances in which a waiver by implication will be found:

"(4) The client's offer of his own or the attorney's testimony as to a *specific communication* to the attorney is a waiver as to all other communications to the attorney on the same matter. This is so because the privilege of secret consultation is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.

. . . .

"(6) When the client alleges a breach of duty to him by the attorney, the privilege is waived as to all communications relevant to that issue." 8 Wigmore, *supra,* § 2327 at 638. (Emphasis in original; footnote omitted.)

See also: McCormick on Evidence, § 91 at 191 and § 93 at 194-95 (2d ed. 1972); Comment, *supra,* 9 U. C. D. L. Rev. at 496-502, 509-511, 518-520. This Court has also recognized that the attorney-client privilege is a defensive shield and not an offensive sword. *In re Niday,* 15 Idaho 559, 566, 98 P. 845 (1908). Here, in support of her defense to the action for specific performance, Mrs. Spencer "testified" both to her communications with her attorneys throughout the settlement process and to the nature of their relation with her while discharging their duties as her attorneys. Having attacked the settlement agreements by this evidence, appellants then sought to prevent respondents from asking certain questions of appellant Louise Spencer's former attorneys, who were the other participants to the conversations so exposed and whose reputation and professional integrity were impugned.

In these circumstances, appellant Louise Spencer's testimony impliedly consented to the disclosure of information she was otherwise privileged to withhold. Fairness requires that what she had disclosed could not later be withheld. Moreover, having herself disclosed communications and conduct otherwise privileged from disclosure, the rationale behind the privilege would no longer be served by recognizing appellant Louise Spencer's efforts to invoke it as a bar to the testimony of her former attorneys.

The preceding application of the general principles governing the attorney-client privilege to the circumstances

of this case is not unique. Many cases quite analogous to this one have been decided by other courts. In *Hunt v. Blackburn,* 128 U. S. 464, 9 S. Ct. 125, 32 L. Ed. 488 (1888), the United States Supreme Court had occasion to decide a question quite similar to the one we decide today. The Court there said:

> "Defendant Blackburn insists, however, in her answer, that the part she took in the litigation of these two cases was the result of misplaced confidence in her counsel, by whom she alleges she was deceived, misadvised, and misled; that she was ignorant of her rights; and that she ought not to be held estopped in the premise; while at the same time it is objected on her behalf that her attorney, on the ground of privileged communications, should not be permitted to defend himself by testifying to the facts and circumstances under which he advised her, and the advice which he actually gave.
>
> "The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure. But the privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets. And if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney. When Mrs. Blackburn entered upon a line of defense which involved what transpired between herself and Mr. Weatherford, and respecting which she testified, she waived her right to object to his giving his own account of the matter." 128 U. S. at 470-471, 9 S. Ct. at 127.

This same reasoning as to the facts here in question has been upheld by the appellate courts of several states

which have been called upon to decide this question. *See: Rose v. Crawford,* 37 Cal. App. 664, 667, 174 P. 69, 70 (1918); *State Compensation Ins. Fund v. Foulds,* 167 Colo. 123, 445 P. 2d 716, 718 (1968); *Fearnley v. Fearnley,* 44 Colo. 417, 98 P. 819, 823 (1908); *Kelley v. Cummens,* 143 Iowa 148, 121 N. W. 540, 541-42 (1909); *Houser v. Frank,* 186 Kan. 455, 350 P. 2d 801, 804 (1960); *Jackson v. Swift & Co.,* 151 So. 816, 818 (La. App. 1934); *Leverich v. Leverich,* 340 Mich. 133, 64 N. W. 2d 567, 568 (1954); *Everett v. Everett,* 319 Mich. 475, 29 N. W. 2d 919, 922 (1947); *In re Arnson Estate,* 2 Mich. App. 478, 140 N. W. 2d 546, 549-50 (1966); *Chase v. Chase,* 78 R. I. 278, 81 A. 2d 686, 688 (1951); *McClure v. Fall,* 42 S. W. 2d 821, 824 (Tex. Civ. App. 1931), aff'd 67 S. W. 2d 231 (Tex. 1934); *Grant v. Harris,* 116 Va. 642, 82 S. E. 718, 720 (1914). *See generally:* Annot., 51 A. L. R. 2d 521 (1957); 8 Wigmore on Evidence, *supra;* McCormick on Evidence, *supra*; Bell, Handbook of Evidence for the Idaho Lawyer, 71-73 (2d ed. 1972); Comment, *supra,* 9 U. C. D. L. Rev. 477 (1976).

Our reading of appellant Louise Spencer's affidavit, her sole evidence in this case, convinces us that the trial court did not err in admitting into evidence the testimony of Mrs. Spencer's former attorneys. By testifying to privileged communications, and by making an issue of her defense the privileged matter of her relation with her former attorneys, appellant Louise Spencer waived the attorney-client privilege for all communications relevant to the settlement process and the conduct of her former attorneys. Her former attorneys were properly permitted to testify.

The appellants also attack the judgment of the trial court on the ground that the findings of fact, conclusions

of law and judgment are not supported by substantial, competent evidence. The basis of their attack is their argument that the testimony of appellant Louise Spencer's former attorneys was improperly admitted at trial. We have concluded above that this testimony was properly admitted. It would serve no purpose here to recite each of the challenged findings and conclusions and the support for them in the evidence in the record. It is enough to repeat the general principle that factual findings made by a trial court will not be disturbed on appeal when they are supported by substantial, competent, although conflicting evidence. I. R. C. P. 52 (a); *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 578, 513 P. 2d 627 (1973). The findings of fact, conclusions of law and judgment of the trial court are supported by substantial, competent evidence.

The judgment of the trial court is affirmed in all respects. Respondents are entitled, pursuant to the terms of the settlement agreements, to attorney's fees on appeal in the sum of $3,000.00. Costs to respondents.

McFADDEN, C. J., DONALDSON, SHEPARD and BAKES, JJ., concur.